

SC 92236

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**IN THE SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**ROBIN ROGGENBUCK,**

**Appellant**

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Appeal from the Circuit Court of Platte County County, Missouri  
6th Judicial Circuit, Division 1  
The Honorable Abe Shafer, Judge

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**APPELLANT'S SUBSTITUTE BRIEF**

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### **JURISDICTIONAL STATEMENT**

Appellant, Robin Roggenbuck, was convicted after a jury trial of five counts of possession of child pornography in the Circuit Court of Platte County, Missouri. This is Appellant's direct appeal.

This appeal does not involve any matters reserved for the exclusive jurisdiction of the Missouri Supreme Court. The appeal was initially decided in the Missouri Court of Appeals, Western District, pursuant to Mo. Const., Art. V, Section 3, Section 477.070 RSMo (2000). The case was ordered transferred to the Missouri Supreme Court pursuant to Mo. Const., Art. V, Section 9 and Mo. S. Ct. Rule 83.04.

## **STATEMENT OF FACTS**

On February 13, 2008, law enforcement officers obtained a search warrant to search an apartment leased by Robin Roggenbuck. (Transcript, “Tr.,” 11-12). The search warrant was obtained based on affidavit of Detective Elizabeth Neland,<sup>1</sup> who also participated in the search. (Tr. 11-12; 260-261). The affidavit stated:

I, Elizabeth Neland, Detective Sergeant with the Platte City, Missouri Police Department . . . STATES AS FOLLOWS. . . .

\* \* \*

I am requesting a Search Warrant for the apartment residence located at 400 Studio Drive, Building #2, Platte City, Platte County, Missouri. The residence of Robin S. ROGGENBUCK w/m DOB 07-26-1952. . . .

The search is to include any and all computers, for any and all computer files, graphic images, photographs, digital photographs, movies or digital motion pictures depicting sexual conduct, sexual contact, or a sexual performance (as those terms are defined in 566.061, RSMo.) including actual or simulated, human masturbation, deviate sexual intercourse, sexual intercourse, or physical contact with or touching of a

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<sup>1</sup> Detective Neland’s name is spelled “Neelan” in the transcript but is written “Neland” in the warrant application and affidavit. As it appears that “Neland” is the correct spelling and for the sake of consistency, Appellant uses that spelling throughout this brief.

person's clothes or unclothed genitals, pubic area, buttock, anus, or the best breast of a female in an act of apparent sexual stimulation or gratification and/or which has as one of its participants or portrays as an observer of such conduct, contact, or performance of a child under the age of 18, in emails, on magnetic media such as tapes, cassette cartridges, floppy disks, computer hard drives, memory cards, memory sticks, compact disks, modems and other computer related operating equipment or any computer storage media, software for operating systems; also passwords, and user identification information which may be stored on the items previously listed; for any items previously listed; for any items, records or documents relating to the offense of possession of child pornography and distribution of pornographic material to a minor, and any adult "sex toys", including, but not limited to "dildos", a massager, and any and all alcohol.

Search to include but not limited to the bedroom area under bed where Mr. Miller stated the massager and "sex toys" are kept and the area under the kitchen sink where Mr. Miller stated the alcohol ROGGENBUCK provides to minors is kept.

On February 13, 2008, Detective Sergeant Elizabeth Neland received information from Eric D. Miller, b/m 03-17-1970, . . . that Robin S. ROGGENBUCK, w/m 07-26-1952, at 400 Studio Drive, Building A, Apartment # 2, Platte City, Platte County, Missouri, had been sexually abusing Eric D. Miller for the past five months at ROGGENBUCK'S

residence. Mr. Miller indicated that ROGGENBUCK has a computer system in the living area of the apartment. . . . Mr. Miller stated that ROGGENBUCK has images of children approximately ten years of age and older on his computer system. Mr. Miller stated that ROGGENBUCK would ask him to look at the images.

On February 13, 2008, Mr. Miller informed Detective Sergeant Elizabeth Neland that Robin S. ROGGENBUCK had stuck his finger and other “sex toys” in his buttocks penetrating the anal cavity. Mr. Miller stated the sex toys were kept under ROGGENBUCK’S bed and that there was only one bed in the apartment. Mr. Miller reported that there are other victims and provided the first names of these victims. Mr. Miller stated ROGGENBUCK keeps a supply of alcohol under the kitchen sink and gives alcohol to the boys to “have his way with them.”

On February 11, 2008, Nina Epperson, M.S. a psychologist, accompanied Eric Miller to the residence located at 400 Studio Drive, Building A, Apartment # 2, Platte City, Platte County, Missouri, to gather his belongings and while inside observed large quantities of alcohol and a large massager plugged into the bedroom wall.

(Supplemental Legal File, “S.L.F.”, 1-2; Appendix, “App.” A17-A18).

Based on this information, law enforcement officers sought and were granted a search warrant authorizing the police officers to search the apartment and seize and

search any and all computers for any child pornography or documents related to the offense of child pornography. (S.L.F., 5).

Law enforcement officers searched the apartment on February 13, 2008. (Tr. 260-261). It was a small studio type of apartment. (Tr. 308) There was a computer on a desk in the living room near the front door. (Tr. 283-285, 291-293). The computer was turned on and had a white box with Yahoo! Messenger (which is a chat program) at the top. (Tr. 295-296). The name Scott Roggenbuck was the user name associated with that program. (Tr. 296). One officer ran a program called ImageScan, which allows investigators to preview images on computer. (Tr. 295, 381). As a result of running ImageScan, the officer saw pictures of Mr. Roggenbuck on the computer. (Tr. 307). Officers looked inside of a drawer in the desk and found a web camera. (Tr. 298). The officers seized the computer and took it to a regional computer forensic laboratory. (Tr. 264, 286, 290).

At the lab, it was examined by a computer forensic examiner. (Tr. 310, 314, 373, 380). The examiner found a PowerPoint presentation file that contained images of boys engaged in sexual activity, including the five images that were the basis for the five counts of possession of child pornography charged to Mr. Roggenbuck. (Tr. 381-387).

The PowerPoint file was on the desktop,<sup>2</sup> not hidden, and any person who logged onto the computer would have seen the icon for the PowerPoint file containing the images. (Tr. 382-383). The PowerPoint file was on the right side of the desktop. (State's

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<sup>2</sup> The "desktop" is what appears on the screen when a user logs onto a computer. (Tr. 381-382)

Ex. 36). The computer typically puts files on the left side, and files on the right side are put there by a user. (Tr. 435-436). By double clicking on the PowerPoint file icon, a person would have seen the images of the boys that served the basis for the charges. (Tr. 383-387).

The PowerPoint presentation was created on January 18, 2007, and last saved on July 12, 2007. (Tr. 455; State's Ex. 48). A link to the PowerPoint presentation was added to a recent files list on November 3, 2007. (Tr. 456-457; State's Ex. 49). It was the examiner's opinion that the PowerPoint file was accessed on January 18, 2007, and on November 3, 2007. (Tr. 456-457).

There were a number of different user accounts<sup>3</sup> on the computer including one user-created account with the name "Robin." (Tr. 388). The registered owner of operating system was Robin. (Tr. 390). When the computer was turned on, it would automatically log-in under the Robin user name without requiring the user to log in or use a password. (Tr. 462). Once logged in under the Robin user name, a PowerPoint document would automatically be saved under the Robin user name. (Tr. 461).

In addition to the PowerPoint file on the desktop, copies of the charge images were in other PowerPoint files on the computer located at "My Documents/My Pictures/New Pic 2 folder." (Tr. 460). And copies of some of the images were located at different parts of the computer. There were multiple copies of a number of the images

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<sup>3</sup> A user account is a defined log-in in which an individual can log-in as a specific user; some come with the computer, and others are created by the user. (Tr. 387-388).

located on the file path “Settings/Robin/My Documents/My Pictures,” which is the default location for storing pictures. (Tr. 401-412, 419; State’s Exs. 29 - 30). In addition, there were some copies of the images located in the file path of Robin user, “My Documents/My Pictures/New Pic 2,” or “My Documents/My Pictures/New Pic 2/My Videos” (Tr. 411-412, 419, 428; State’s Exs. 29 - 33).

The “New Pic 2” folder was not a folder that came with the operating system and would have been created by a user. (Tr. 412-413). These copies were created and modified at various times from January 13, 2007, to February 17, 2007. (Tr. 397-429; State’s Exs. 29 - 33).

The examiner was able to determine that one of the images was downloaded from the internet on January 13, 2007. (Tr. 422). There was no evidence concerning the date the other images were downloaded. The examiner attempted to identify dates when each of the charged images was “created” and modified. (Tr. 397-431; St. Exs. 29-33). Some of the dates, however, were erroneous—with the image having been allegedly modified before it was created. (Tr. 403-404; State’s Ex. 29, pg. 1). The examiner could not explain the anomaly. (Tr. 404).

In addition to the pictures of the boys that gave rise to the charges, the examiner also found a photograph of Robbenbuck, which was located in the Robin user account, path of “Documents and Settings/Robin,” in the “My Documents” folder; the image was also in the “My Pictures” folder with the file name of “My Pic.jpg.” (Tr. 397). The examiner also found a web camera video of Mr. Roggenbuck on the computer. (Tr. 430-431; State’s Ex. 34). There was an e-mail account on the computer for

“rscott52rscott@aol.com.” (Tr. 390). There were file names that contained the name Scott. (Tr. 390). And there were cookies<sup>4</sup> on the computer that contained the word “rscott52rscott@aol.com.” (Tr. 392-393).

There were also some text documents that appeared to be resumes<sup>5</sup> on the right side of the desktop. (Tr. 437-449). The content of these documents were admitted over Mr. Robbenbuck’s objection. (Tr. 438-449; State’s Exs. 38-39). These documents had the name “Scott Roggenbuck,” and listed an email address of “rscott52rscott@aol.com.” (Tr. 442). One listed familiarity with computer applications including MS Word, MS Excel, MS PowerPoint, MS Publishing, MS Money, MS Access, MS Outlook, Internet Explorer and QuickBooks. (Tr. 442; State’s Ex. 38). That document also listed “Business Computer Training Institute, Advanced Integrated Computer Applications, current student, graduated top 10 percent on September 5<sup>th</sup>, 2003, receiving professional hands-on training in a simulated office environment creating, editing and proofreading correspondence using advanced applications.” (Tr. 442-443; State’s Ex. 38). Another resume version had the name of Scott Roggenbuck, contained an address of 400 North Studio Drive, Apartment A-2, Platte City, MO 64079, had an email address as “rscott52rscott@aol.com,” and listed as the applicant’s objective “to obtain an administrative position utilizing my customer service and computer skills.” (Tr. 444-447;

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<sup>4</sup> A “cookie” is a trace file placed onto a system by a web site so that the next time the user goes to the web site it can recall the information. (Tr. 392).

<sup>5</sup> It appears that the word “resume” was printed as “r sum ” throughout the transcript.

State's Ex. 39). Other versions contained similar information and referred to Scott Roggenbuck. (Tr. 448)

Detective Neland's investigation indicated that there was more than one person living at the apartment<sup>6</sup>. (Tr. 264-265). The initial lease agreement listed David W. Nelson as another person living in the apartment. (State's Ex. 13). In addition to the "Robin" user account, the computer examiner found a number of additional user accounts on the computer. (Tr. 387). The examiner was not specifically looking for alternate users, but found other file names on the computer for Eric Miller, Jeff Vars, and Joshua Gladowski. (Tr. 463).

Mr. Roggenbuck filed a motion to suppress all evidence collected during the search of the apartment on February 13, 2008, on the basis that the affidavit filed to obtain the warrant failed to state adequate facts to establish probable cause and was in violation of RSMo 542.276. (L.F. 13-14). The motion was denied and the State was allowed to elicit evidence concerning the search of the apartment and computer over Mr. Roggenbuck's objections. (Tr. 260-261, 280-281, 294, 314-315, 383-387, 393, 396).

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<sup>6</sup> At the suppression hearing, Detective Neland testified that Mr. Miller was living in the apartment with Mr. Roggenbuck. (Tr. 13). At trial, the court sustained the State's objection to Mr. Roggenbuck's questioning of Detective Neland as to who was living with Mr. Roggenbuck. (Tr. 265). No objection was made or corrective action sought with respect to Detective Neland's testimony that "she was aware that more than one person was living at that apartment." (Tr. 264-265).

Mr. Roggenbuck was ultimately charged with five counts of possession of child pornography. (L.F. 36-39). With respect to each count, the State alleged that Mr. Roggenbuck was in possession of the material “between and including January 18, 2007 and February 13, 2008.” (L.F. 36-39). The instructions mirrored the charges and required the jury to convict on each charge if it found Mr. Roggenbuck possessed and had knowledge of the content of the image “between and including January 18, 2007 and February 13, 2008.” (L.F. 68-77).

In argument, the State asserted that because that PowerPoint file that contained all five charged images was on the desktop and was not hidden, Mr. Roggenbuck must have known of their existence and would be criminally responsible, even if someone else downloaded the images. (Tr. 485, 490-491, 505, 507). The State also argued that the information taken from the resumes helped to prove that Mr. Roggenbuck lived at the apartment, was in possession of the computer, and would have known of the contents of the PowerPoint presentation, which was on the desktop and contained the five images. (Tr. 491, 493-494, 504-505).

The jury convicted Mr. Roggenbuck of all five counts of possession of child pornography. (Tr. 510). The court sentenced Mr. Roggenbuck as a prior and persistent offender to five consecutive seven-year terms of imprisonment, for a total sentence of thirty-five years. (App. 1-2; L.F. 134-135).

This appeal follows.

## **POINTS ON APPEAL**

### **I. The Search Warrant Lacked Probable Cause.**

The trial court erred in overruling Appellant's motion to suppress evidence and in admitting into evidence the computer seized from the apartment and the material contained on the computer, including the five images that gave rise to the charges, because the search violated Appellant's rights to be free from unlawful search and seizure, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution, in that the affidavit offered in support of the search warrant application failed to establish probable cause and was so lacking in indicia of probable cause that reliance on it was unreasonable in that it was conclusory and lacked a factual basis and a sufficient basis to determine the credibility or veracity of the allegations, it did not contain factual assertions evidencing that any crime occurred, and it did not contain a sufficient showing that the computer would contain evidence of a crime or contraband.

*Illinois v. Gates*, 462 U.S. 213 (1983);

*State v. Brown*, 741 S.W.2d 53 (Mo. App. W.D. 1987);

*State v. Hammett*, 784 S.W.2d 293 (Mo. App., E.D. 1989);

*United States v. Leon*, 468 U.S. 897 (1984);

U.S. Const., Amend. IV and XIV;

Mo. Const., Art. I, Sec. 15;

Section 542.276 RSMo.

## **II. The Entry of Five Separate Convictions Constituted a Violation of the Constitutional Protections against Double Jeopardy, Due Process and the Right to a Trial by Jury**

The trial court plainly erred in entering eight separate convictions, and eight consecutive sentences for possession of child pornography because the entry of multiple convictions pursuant to § 573.037 RSMo for possession of a series of images violated the prohibition against multiple punishments for a single offense under the double jeopardy clause of the Fifth Amendment of the United States Constitution and the due process and right to a jury trial provisions of the United States and Missouri Constitutions in that § 537.037 RSMo (2007 Supp.) does not provide for separate prosecutions of each individual image absent a showing that the defendant came into possession of each image on a separate date or from a separate source and that issue was not pled or submitted to the jury.

*Apprendi v. New Jersey*, 530 U.S. 466 (2000);

*State v. Liberty*, SC 91821, slip op. (Mo. banc, May 29, 2012);

Section 573.010 RSMo (2007 Supp.);

Section 573.037 RSMo (2007 Supp.);

Mo. Const., Art. I, Secs. 10 and 22(a);

U.S. Const., Amends. V and XIV;

Mo. S. Ct. Rule 30.20.

### **III. The Court Erred in Admitting Hearsay Evidence from the Resumes**

**The trial court erred in admitting into evidence documents and testimony about the content of documents purporting to be resumes of Mr. Roggenbuck, in violation of Mr. Roggenbuck's rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because the content of the documents was hearsay in that the documents were offered for the truth of the matter asserted; and because the documents were admitted without a proper foundation as statements of Mr. Roggenbuck, in that State failed to authenticate Mr. Roggenbuck as the author other than by what the documents purported to be and by virtue of the fact that they were found on a computer in an apartment he leased.**

*State v. Cravens*, 132 S.W.3d 919 (Mo.App. S.D., 2004);

*State v. Harris*, 620 S.W.2d 349 (Mo. banc 1981);

Mo. Const., Art. I, Sec. 10;

U.S. Const., Amends. V and XIV.

## **ARGUMENT**

### **I. The Search Warrant Lacked Probable Cause.**

The trial court erred in overruling Appellant's motion to suppress evidence and in admitting into evidence the computer seized from the apartment and the material contained on the computer, including the five images that gave rise to the charges, because the search violated Appellant's rights to be free from unlawful search and seizure, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution, in that the affidavit offered in support of the search warrant application failed to establish probable cause and was so lacking in indicia of probable cause that reliance on it was unreasonable in that it was conclusory and lacked a factual basis and a sufficient basis to determine the credibility or veracity of the allegations, it did not contain factual assertions evidencing that any crime occurred, and it did not contain a sufficient showing that the computer would contain evidence of a crime or contraband.

#### ***Standard of Review***

Appellant preserved the issue by filing a motion to suppress (L.F. 13-14), by objecting to the evidence throughout trial (Tr. 260-261, 280-281, 294, 314-315, 383-387, 393, 396), and by including the issue in his motion for a new trial. (L.F. 107-109, 111-114, 120-125).

In reviewing a motion to suppress based upon an insufficient warrant, appellate courts give great deference to the initial judicial determination of probable cause made at

the time of the issuance of the warrant, and reverse only if that determination is clearly erroneous. *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990).

In reviewing whether the issuing judge was clearly erroneous, appellate courts look to the four corners of the affidavit in support of the search warrant. *State v. Laws*, 801 S.W.2d 68, 70 (Mo. banc 1990).

### *Discussion*

The constitutions of the United States and of Missouri protect against unreasonable searches and seizures and state that “no warrants shall issue but upon probable cause, supported by oath or affirmation. . . .” U.S. Const., Amend. IV; Mo. Const., Art. I, Sec. 15. When evidence is obtained in violation of these constitutional provisions the exclusionary rule<sup>7</sup> prohibits use of the evidence. *State v. Brown*, 708 S.W.2d 140, 145 (Mo. banc 1986).

At issue in this case is whether the affidavit submitted by Detective Neland was sufficient to support finding of probable cause by the reviewing court to permit the issuance of the search warrant to seize and search computers for child pornography. And,

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<sup>7</sup> Missouri adopted its own independent exclusionary rule prior to the ruling in *Mapp v. Ohio*, 367 U.S. 643 (1961) applying the federal exclusionary rule to state prosecutions. *Brown*, 708 S.W.2d at 145 n. 10. Missouri courts, however, tend to follow United States Supreme Court precedent in applying the search and seizure requirements of the Missouri Constitution and the Missouri exclusionary rule. *Id.* at 145-146; *State v. Sweeney*, 701 S.W.2d 420, 425 n. 4 (Mo. banc 1985).

if there was no sufficient probable cause for the issuance of the warrant, the inquiry turns to determine whether the good faith exception to the exclusionary rule applies.

#### **A. No Probable Cause in the Affidavit**

In determining whether an affidavit is sufficient for a search warrant to issue, the issuing judge:

is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the [judge] had a ‘substantial basis for ... conclud[ing]’ that probable cause existed.

*Illinois v. Gates*, 462 U.S. 213, 238 (1983). This is a “totality-of-the-circumstances” analysis. *Id.*

While this Court must give the issuing judge’s initial determination “great deference,” the judge does not have unbridled discretion. As noted in *State v. Hammett*, 784 S.W.2d 293, 295 (Mo. App., E.D. 1989), “*Gates* states that ‘[a]n affidavit must provide the [issuing judge] with a *substantial* basis for determining the existence of probable cause.’” In making this determination, the issuing judge can only examine the information brought to the judge’s attention in the affidavit. *See United States v. Jacobsen*, 466 U.S. 109, 112, n. 2 (1984); *Whiteley v. Warden*, 401 U.S. 560, 564 n. 8

(1971); *State v. Laws*, 801 S.W.2d 68, 70, n. 1 (Mo banc 1990); § 542.276.3<sup>8</sup> (prohibiting the receipt of oral testimony). This basis must be a *factual* one. It cannot be founded on mere conclusory statements provided by the officer that give the reviewing judge virtually no basis for making an informed probable cause determination. *See Gates*, 462 U.S. at 239; *State v. Brown*, 741 S.W.2d 53, 55 (Mo. App. W.D. 1987). That substantial basis must also include information to determine the “veracity” and “basis of knowledge” of persons supplying hearsay information. *Hammett*, 784 S.W.2d at 295-296. In addition, that substantial basis must exist *before* the search warrant is issued, and not afterwards with the benefit of 20-20 hindsight. *Id.*

In the Court of Appeals, the State argued that the affidavit made a showing of probable cause with respect to the commission of three types of criminal conduct: (1) the alleged sexual abuse committed against Mr. Miller over the course of five months; (2) alleged unspecified crimes committed against unidentified other “boys” of unspecified ages; and (3) possession of child pornography.

### **1. The Alleged Sexual Abuse Committed Against Mr. Miller Over the Course of Five Months**

The affidavit in this case appears to have been primarily directed at discovering evidence concerning sexual abuse allegedly committed against Eric Miller over a period of five months. Thus, the affidavit stated that Detective Neland “received information from Eric Miller . . . that Robin S. ROGGENBUCK had been sexually abusing Eric D.

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<sup>8</sup> All statutory references are to RSMo 2000 as supplemented unless otherwise noted.

Miller for the past five months at ROGGENBUCK’S residence.” (S.L.F., 2; App. A18). This broad, general and conclusory statement devoid of facts is not sufficient to allow the judge to determine that probable cause exists. The statement does not indicate what information was obtained by Detective Neland that led the detective to believe that Mr. Roggenbuck was abusing Mr. Miller, or even how Mr. Robbenbuck was allegedly sexually abusing Mr. Miller. As noted by the court in *Hammet*, “*Gates* requires that an issuing judge not merely ratify ‘the bare conclusions of others.’ *Gates*, 462 U.S. at 239.” 784 S.W.2d at 296. Detective Neland’s conclusion that the information provided to her led her to believe Mr. Miller had been sexually abused provides no support for a finding of probable cause.

The only specific facts set forth in the affidavit concern sexual acts Mr. Robbenbuck allegedly engaged in with Mr. Miller on a single occasion. Had Mr. Miller been under the age of seventeen, such conduct would have been criminal. See § 556.062. However, the birth date listed for Mr. Miller as 03-17-1970. (S.L.F., 2; App. A18). And there is no indication that Mr. Miller was under the age of consent or that Mr. Roggenbuck committed any type of statutory sexual offense such as statutory sodomy (§ 566.034) or child molestation (§ 566.068). Also absent from the affidavit is any indication that Mr. Roggenbuck engaged in the sexual acts through forcible compulsion<sup>9</sup>

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<sup>9</sup> The only identification of an alleged crime is Detective Neland’s assertion that Mr. Miller had been “sexually abused.” (S.L.F., 2; App. A17). Sexual abuse consists of subjecting “another person to sexual contact by the use of forcible compulsion.” §

or without Mr. Miller's consent. The mere fact that two men engaged in sodomy is not criminal. Nor is there any indication how the single incident led Detective Neland to conclude that Mr. Roggenbuck was sexually abusing Mr. Miller "for the past five months." If Mr. Miller did in fact provide more information to Detective Neland, that information was not set forth in the affidavit.

Although not specifically addressed by a court in this state, an Ohio court has noted that the courts cannot simply infer that an adult was the victim of a sexual assault simply because there was evidence of sexual conduct. *State v. McNamee*, 745 N.E.2d 1147, 1151 (Ohio Ct. App. 2000). Such an inference would be contrary to the clear requirement that warrants be founded on factual assertions, not conclusions. *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *State v. Brown*, 741 S.W.2d 53, 55 (Mo. App. W.D. 1987). The affidavit in this case is completely devoid any factual statements that support the detective's bare assertion that Mr. Roggenbuck had been sexually abusing Mr. Miller.

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566.100. If the sexual act described in the affidavit had been committed by forcible compulsion, the actual charge would have been forcible sodomy under § 566.060. If it had been committed without consent, the charge would have been deviate sexual assault under § 566.070. Mr. Roggenbuck was charged with the class C felony of deviate sexual assault under § 566.070, but this charge was dropped and never prosecuted. (L.F. 9).

## **2. Alleged Sexual Abuse Committed Against Unidentified Other “Boys” of Unspecified Ages**

The affidavit also makes vague references to other victims and that Mr. Roggenbuck kept alcohol to give to “the boys” to “have his way with them.” (Aff., S.L.F., 2; App. A18). The ages of “the boys” are not set forth, although in describing the area to be searched, Detective Neelan stated that the search is to include “the area under the kitchen sink where Mr. Miller stated he the alcohol ROGGENBUCK provides to minors is kept.” (Aff., S.L.F., 2; App. A18). Although Detective Neland referred to “the boys” as “minors”, there is no indication that Mr. Miller actually told detective Neland the actual or approximate ages of these individuals. Nor are there sufficient specific allegations indicating that Mr. Roggenbuck engaged in sexual activity with these “boys,” or that if he did, that the unspecified sexual activity was forcible or non-consensual. Absent some indication of the ages of these “other victims,” the statements concerning other victims also fail to set forth criminal activity.

The information concerning the “other victims” is also problematic as there were not sufficient facts to determine the veracity of this report. First, there is no indication of Mr. Miller’s basis for making this allegation. There is no indication that Mr. Miller actually witnessed Mr. Roggenbuck giving alcohol to anyone or engaging in any illegal conduct. If Mr. Miller did not have first-hand knowledge of the events, there is no way to assess the credibility of his report about these other victims. Other than the presence of alcohol in the apartment—which is not itself unusual or indicative of criminal conduct—there was nothing in the affidavit indicating any attempt by law enforcement officials to

corroborate the reports about the “other victims.” Second, there are no specific facts set forth concerning these events such as the dates or the actual specific type of conduct Mr. Roggenbuck allegedly engaged in with “the boys.” So it is not possible to determine if the information is stale or that a search of the apartment and computer equipment was likely to lead to the discovery of evidence concerning these crimes.

### **3. Possession of Child Pornography.**

Even if the conclusory allegation of the abuse of Mr. Miller was sufficient to demonstrate probable cause that a crime had been committed, these do not provide a basis for the State to seize and search the computer to search for child pornography. There is nothing in the allegations about the alleged sexual abuse indicating that a computer was involved. Although Mr. Miller apparently told Detective Neland that Mr. Roggenbuck would ask Mr. Miller to look at photographs of children on a computer (S.L.F., 2; App. A18), there was no indication that the photographs played any role in the alleged sexual abuse. Photographs of children are not contraband. Nor would the presence of photographs of children corroborate any claim that Mr. Roggenbuck was sexually abusing Mr. Miller.

Similarly, even if Mr. Miller’s report of “other victims” was sufficient to show probable cause to search the apartment for whatever unspecified crimes may have been committed against these other victims, these allegations also do not provide a basis for the State to seize and search the computer for child pornography. Again, there is nothing in the allegations about the other victims indicating that a computer was involved in any

way with providing alcohol to the boys or with whatever activity might have occurred between Mr. Roggenbuck and these “boys.” (S.L.F. 2; App. A18).

A number of courts have grappled with the question of whether evidence that an individual engaged in a sexual crime against a child is sufficient to also support a search for child pornography. Many hold that the establishment of probable cause indicating that a suspect engaged in a child sex offense does not authorize a search for evidence of child pornography. *Virgin Islands v. John*, 654 F.3d 412, 418-22 (3<sup>rd</sup> Cir. 2011); *Dougherty v. City of Covina*, 654 F.3d 892, 897-99 (9<sup>th</sup> Cir. 2011); *United States v. Colbert*, 605 F.3d 573, 579-581 (8<sup>th</sup> Cir. 2010) (Gipson, J, dissenting); *United States v. Hodson*, 543 F.3d 286, 292 (6<sup>th</sup> Cir. 2008); *United States v. Falso*, 544 F.3d 110 (2<sup>nd</sup> Cir. 2008). A divided panel of the Eighth Circuit, however, has held that a tendency to sexually abuse or exploit children is relevant to the analysis of whether probable cause exists to search for child pornography, asserting that “[t]here is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography.” *United States v. Colbert*, 605 F.3d 573, 575-576 (8<sup>th</sup> Cir. 2010). This view was adopted by the Missouri Court of Appeals in the Southern District in *State v. Johnson*, SD 31437, slip op., --- S.W.3d --- (Mo. App. S.D., July 17, 2012).

However, even under the view adopted by the court in *Colbert*, there was no basis for search for child pornography in this case on that basis for the simple reason that there was no allegation showing that Mr. Roggenbuck had been or was engaged sexual conduct with a child. Absent even from the conclusory statements in the affidavit was any assertion that Mr. Roggenbuck committed statutory rape, statutory sodomy, or child

molestation or any other offense that is based on the age of the victim. Also absent was any indication that Mr. Miller or any of the other victims were under the age of seventeen—the general age delineating children from adults in Missouri with respect to sex crimes. See §§ 566.034, 566.064, 566.068. In the absence of any facts in the affidavit indicating that Mr. Roggenbuck was sexually abusing children, the search for child pornography cannot be supported by any attempt to draw a connection between pedophilia and child pornography. See *United States v. Weber*, 923 F.2d 1338, 1340-41, 1345-46 (9th Cir. 1991) (although affidavit in support of search warrant for child pornography set forth the proclivities of pedophiles and child pornography collectors, “there was not a whit of evidence in the affidavit indicating that Weber was a ‘child molestor’”).

The affidavit in the present case failed to set forth sufficient facts to establish probable cause that Mr. Roggenbuck was involved in criminal activity and is the type of conclusory and “bare bones” affidavit condemned in *Hammitt*, 784 S.W.2d at 296, and *Brown*, 741 S.W.2d at 56. The extremely limited information showed only that Mr. Roggenbuck engaged in sexual activity with another man, that he would drink and “have his way” with other unidentified “boys” of unspecified ages, and that he had pictures of children on his computer. There were no facts set forth that would suggest that the sexual conduct with Mr. Miller was forcible or without his consent, or that the pictures of the children were pornographic or obscene. Because there was absolutely no factual basis in the affidavit to believe that a crime had occurred, there was no basis to believe or suspect that evidence of this “crime” would be found in the apartment or on the computer. There

was not even a “fair probability” that this evidence would be found because, by definition, without an underlying crime, there can be no evidence of criminal activity. *See Brown*, 741 S.W.2d at 56 (holding that a warrant was improper when the facts in the affidavit failed to show any link to a crime). And even if the bare bones affidavit was sufficient to establish probable for the unspecified crimes allegedly committed against Mr. Miller and the “other victims,” the affidavit did not establish any connection between those unspecified crimes and the search of the computer for child pornography.

### **B. No Good Faith Reliance of the Warrant.**

In *United States v. Leon*, 468 U.S. 897, 922 (1984), the Court held that evidence should not be excluded if the law enforcement officers obtained the evidence “in objectively reasonable reliance on a subsequently invalidated search warrant.” The Court also stated, however, that this good faith rule is subject to a number of exceptions. *Id.* at 923. One exception, which is applicable to this case, is that “an officer [would not] manifest objective good faith in relying on a warrant based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *Id.* This exception has been applied to preclude a finding of good faith reliance on warrants issued based on “bare bones” affidavits that are insufficient to establish any indicia of probable cause. *Hammett*, 784 S.W.2d at 297; *Brown*, 741 S.W.2d at 58-59.

The affidavit in this case was so inadequate that no law enforcement officer could have, in good faith, believed it was constitutionally adequate to support the search warrant in this case. This is not a situation that involved assessing the credibility of an

informant or some other judgment about which reasonable people might differ. Nor is this a case where there was some technical deficiency. Rather, the affidavit in this case set forth minimal facts, and the factual matter set forth provided no basis to believe even that any criminal activity occurred. Because Detective Neland prepared the affidavit and obtained and participated in its execution (Tr. 11, 260-262), she must have known that it did not set forth a substantial basis for believing that a crime had been committed or that there might be a fair possibility of locating evidence pertaining to this “crime” in the apartment or on the computer.

**1. The Court Should Not Consider Information Not Set Forth in the Affidavit.**

At the suppression hearing, Detective Neland testified that Mr. Miller told her “that there was a computer in the living room of the apartment that had contained *pornographic* images of children.” (Tr. 14). However, Detective Neland did not include state that Mr. Miller told him that the images were pornographic in the affidavit. In the Court of Appeals, the State argued that this information, known to Detective Neland, but not included in the warrant application, should be considered and demonstrated that the police were acting in good faith in relying on the warrant. This State’s argument must be rejected for two reasons. First, the courts should not consider information not presented to the issuing judge in determining whether the officers were acting in good faith reliance on the judge’s issuance of the search warrant. Second, the fact that Mr. Miller told Detective Neland that the computer “had contained pornographic images of children” itself is not sufficient to support a finding of probable cause.

Whether information that was not provided to the issuing court can be used to supplement a deficient showing of probable cause in an affidavit has not been addressed in Missouri. Other jurisdictions are split on the issue. The following cases hold that the good faith reliance inquiry in *United States v. Leon*, 468 U.S. 897 (1984) does not permit courts to consider to facts known to officers but not included in affidavit (or communicated to the issuing judge) in order to establish probable cause:

- *United States v. Laughton*, 409 F.3d 744, 751-752 (6<sup>th</sup> Cir. 2005);
- *United States v. Koerth*, 312 F.3d 862, 871 (7<sup>th</sup> Cir. 2002);
- *United States v. Hove*, 848 F.2d 137, 140 (9<sup>th</sup> Cir. 1988);
- *Ex parte Green*, 15 So. 3d 489, 495-97 (Ala. 2008);
- *Janis v. Commonwealth*, 472 S.E.2d 649, 653–55 (Va. App. 1996);
- *State v. Klosterman*, 683 N.E.2d 100, 103–05 (Ohio App. 1996);
- *Helms v. State*, 568 So.2d 384, 387-389 (Ala. Crim. App. 1990);
- *Herrington v. State*, 697 S.W.2d 899, 900-901 (Ark. 1985); *see also*
- *United States v. Bynum*, 293 F.3d 192, 210-213(4<sup>th</sup> Cir. 2002) (Michael, C.J., dissenting)(the majority opinion did not reach this issue, 293 F.3d at 199).

The following cases permit courts to look at additional facts supporting a finding of probable cause not originally submitted to the issuing judge:

- *United States v. Martin*, 833 F.2d 752 (8<sup>th</sup> Cir. 1987);
- *United States v. Taxacher*, 902 F.2d 867, 871–73 (11<sup>th</sup> Cir.1990);
- *Moore v. Commonwealth*, 297 S.W.3d 325, 328 (Ky 2005); and

- *State v. Edmonson*, 598 N.W.2d 450, 460–62 (Neb. 1999).

Permitting the State to supplement a deficient affidavit with additional facts is not consistent with the language of the United States Supreme Court in setting forth good faith exception in *United States v. Leon*, 468 U.S. 897, 922-923 (1984), and would substantially undermine the integrity of the warrant process, such a rule should not be sanctioned.

In *Leon*, the Court concluded that excluding evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant would not deter unconstitutional police practices. 468 U.S. at 921-922. As stated by the Court, “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” *Id.* at 922. However, the Court went on to note that “the officer’s reliance on the magistrate’s probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.” *Id.* at 922-923.

The Court in *Leon* did note four exceptions where suppression would be appropriate. *Id.* at 923. Relevant in this case is whether the “warrant [was] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Id.* (internal quotation and citations omitted). In discussing this exception the Court explained, “sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere

ratification of the bare conclusions of others.” *Id.* at 915 (quoting *Illinois v. Gates*, 462 U.S. at 239).

As set forth by the Court in *Leon*, the focus of the inquiry is not whether the officer reasonably believed there was probable cause, but rather whether the information provided to obtain the warrant was sufficient to permit the officer to rely on the issuing judge’s finding of probable cause to issue the warrant<sup>10</sup>. *Id.* As noted by Judge Michael in the Fourth Circuit in *Bynum*:

An officer’s reasonable belief that he has probable cause for a search may be a necessary condition of objective good faith, but it is not a sufficient condition. *Leon* also requires courts to ask whether the officer had an objectively reasonable belief that his affidavit gave the *magistrate* a substantial basis for finding probable cause. The point is underscored by *Leon*’s language describing the third circumstance that bars application of the good faith exception: “Nor would an officer manifest objective good

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<sup>10</sup> The Supreme Court did state that in making the determination of whether a reasonably well trained officer would have known that the search was illegal, “all of the circumstances—including whether the warrant application had been previously rejected by a different magistrate—may be considered.” *Leon*, 468 U.S. at 922, n. 23. The Court never stated that facts known the affiant but not presented to the magistrate is a part of “all of the circumstances” that courts should consider in determining whether the officers acted in good faith “reliance on the magistrate’s probable cause determination.”

faith in relying on a warrant based on *an affidavit so lacking in indicia of probable cause* as to render official belief in its existence entirely unreasonable.” *Leon*, 468 U.S. at 923, 104 S.Ct. 3405 (emphasis added) (internal quotation marks and citation omitted). *See also Malley*, 475 U.S. at 345<sup>11</sup> (stating that courts should determine the objective reasonableness of an officer’s reliance on a warrant by asking “whether a reasonably well-trained officer ... would have known that *his affidavit* failed to establish probable cause” (emphasis added)). I do not understand how information known to the affiant but not presented to the magistrate can be used to decide whether an affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Leon* and *Malley*’s emphasis on the officer’s affidavit suggests that an officer has a duty to ask not only whether he knows enough to establish probable cause, but also whether he has given the magistrate at least a substantial basis for finding probable cause.

*Bynum*, 293 F.3d at 211.

A search performed pursuant to a warrant issued without a substantial basis for the issuing judge to conclude that probable cause existed is illegal. *Id.* at 212, citing *Gates*, 462 U.S. at 238. Under *Leon*, the exclusionary rule should apply when “a reasonably well trained officer would have known that the search was illegal despite the magistrate’s

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<sup>11</sup> *Malley v. Briggs*, 475 U.S. 335, 345 (1986).

authorization.” 468 U.S. at 922 n. 23. Thus, an officer acts in good faith only if she had a reasonable belief that the magistrate had a substantial basis for finding probable cause.

*Bynum*, 293 F.3d at 212. Thus, as stated by Judge Michael in *Bynum*:

Because the reasonableness of the magistrate’s probable cause determination is solely a function of the information presented to the magistrate, *see Whiteley v. Warden*, 401 U.S. 560, 565 n. 8, (1971), information not presented to the magistrate cannot be relevant to the question ‘whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.’ *Leon*, 468 U.S. at 922 n. 23.

*Bynum*, 293 F.3d at 212.

Or, as noted by the court in *Hove*:

*Leon* creates an exception to the exclusionary rule when officers have acted in reasonable reliance on the ruling of a judge or magistrate. The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer’s ruling in executing the warrant. *Leon*, 468 U.S. at 916-17. When the officers have not presented a colorable showing, and the warrant and affidavit on their face preclude reasonable reliance, the reasoning of *Leon* does not apply. To permit the total deficiency of the warrant and affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant would, we believe, unduly erode the protections of

the fourth amendment.

848 F.2d at 140.

In explaining the difference between those authorities that permit extraneous evidence to support a showing of probable from those that do not, the Maryland Court of Appeals noted:

The cases that allow such testimony to be received focus on the fact that the evidence helps to establish that the officer in good faith believed that probable cause existed to support the search. The cases that would disallow such testimony, by contrast, stress that the object of the good faith should be not the existence of probable cause to justify the search but rather the legal adequacy of the application to support the issuance of the warrant. In terms of the undergirding rationale of *Sheppard*<sup>12</sup> and *Leon*—the reasonable deference of the officer to the judge as the basis of reasonableness—the latter position would appear far sounder.

*State v. Jenkins*, 941 A.2d 517, 547 (Md. App. 2008).

And as noted by the Alabama Supreme Court: “It is ‘disingenuous, after having gone to [a district judge] with the paltry showing here, to suggest, as the [State] suggests, that at bottom it was the [district judge] who made the error and the search and seizure are insulated because the officer’s reliance on that error was objectively reasonable.’” *Ex parte Green*, 15 So.3d 489, 495-497 (Ala. 2008). Although *Leon* counsels that officers

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<sup>12</sup>*Massachusetts v. Shepard*, 468 U.S. 981 (2000).

should not be penalized for a court's error, where officers do not present all relevant information to the court so that it can fulfill its constitutional duty to make the determination of whether probable cause exists, the error is the officers', not the court's.

Consideration of facts known to an officer but not included in a search warrant affidavit is even more problematic in Missouri. Missouri does not permit consideration of oral testimony in determining probable cause to issue a warrant. § 542.276.3 RSMo. This is unlike the federal courts that permit warrants to be issued based on oral communications. See Fed. R. Crim. P. 41. Where a warrant is based on an oral communication, there is a greater likelihood of miscommunication and it would be more difficult for the officer in the field to know exactly what information was actually provided to the judge who issued the warrant. An officer who has knowledge of facts sufficient to show probable cause may justifiably believe that the warrant was issued based on those facts. In Missouri, however, the warrant can only be issued based on information set forth in the application and accompanying written applications. Mo. Const., Art. I, § 15; § 542.276 RSMo. Thus, there is a very clear record of exactly what information was provided to the judge in the warrant application. An officer in Missouri cannot not in good faith believe that additional supporting facts were set forth.

**2. The Bare Assertion that an Image is Pornographic is Not Sufficient to Establish Probable Cause.**

Additionally, even if this Court were to consider Detective Neland's testimony that Mr. Miller told her that there was a computer in the house that "contained pornographic images of children" (Tr. 14), there still would not have been a sufficient

showing of probable cause to justify an intrusive search into the computer. When dealing with obscene or pornographic materials, an officer's bare conclusion that images believed to be in the possession of the subject of the search were "pornographic" is not sufficient. *United States v. Burnette*, 256 F.3d 14, 18 (1<sup>st</sup> Cir. 2001); *State v. Nuss*, 781 N.W.2d 60, 66-68 (Neb. 2010). Because items that some may consider to be pornographic may not fall within legal prohibitions (and may be protected under the First Amendment), the judge must be provided with either the images or a reasonably detailed factual description of the images to make a determination whether what was seen falls within statutory prohibitions and thus constitutes reasonable cause for a search warrant. *Id.*; *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 873-874 (1986) ("[A] warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may focus searchingly on the question of obscenity.")

In some instances, courts have concluded that conclusory allegations that materials are pornographic are sufficient where: (a) the criminal statute at issue specifically identifies prohibited material in an objective manner; (b) the allegation in the affidavit identifies the statute or makes reference to the language in the statute; and (c) there is some showing that the person asserting the conclusion has training or knowledge to be able distinguish lawful from unlawful materials. *See e.g. United States v. Smith*, 795 F.2d

841, 848-49 (9th Cir. 1986); *United States v. Grant*, 490 F.3d 627, 630-632 (8<sup>th</sup> Cir. 2007). However, those conditions are not present in this case.

In this case, the applicable Missouri statutes did not set forth specific objective criteria for distinguishing lawful from unlawful materials. Under the law applicable at the time, “a person commits the crime of possession of child pornography if . . . such person possesses any obscene material that has a child as one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct.” § 573.037, RSMo (2007 Supp.). “Sexual conduct” is defined in relatively specific and objective terms. § 566.010 RSMo (2007 Supp.). But, the question of what constitutes obscenity requires complicated and subjective consideration of whether the material’s “predominant appeal is to prurient interest in sex; . . . the material depicts or describes sexual conduct in a patently offensive way; and the material lacks serious literary, artistic, political or scientific value.” § 573.010(23) RSMo (2007 Supp.). “An affidavit that merely alleges that certain photographs are ‘obscene,’ therefore, makes a complicated and subjective conclusion unsuitable for an independent judicial evaluation and therefore inadequate for the issuance of a warrant.” *Smith*, 795 F.2d at 848 n. 7.

In addition to having a statutory scheme that does not distinguish between lawful and unlawful materials in a specific and objective manner, Detective Neland’s testimony that Mr. Miller told her that the materials were “pornographic” did not specifically reference the Missouri obscenity statutes or use language contained in the statutes. And there was no showing that Mr. Miller had any knowledge of the Missouri obscenity laws when he told Detective Neland that a computer in the apartment “contained pornographic

images of children.” (Tr. 14). Thus, there was no indication that Mr. Miller’s understanding of what constituted pornography was consistent with the laws pertaining to obscenity and child pornography. His bare assertion to Detective Neland that images on the computer were pornographic would not be sufficient for either a judge or a law enforcement officer to find probable cause that the computer contained contraband or evidence of a crime.

There are some cases that have found that officers who act on a warrant based on a conclusory allegation set forth in the affidavit that materials were pornographic were acting in good faith reliance on the judge’s finding of probable cause and issuance of the warrant. *See e.g., Nuss*, 781 N.W.2d. at 656-658. In this case, however, the officers did not include even the conclusory allegation in the affidavit, so the judge could not have considered it in issuing the warrant. And thus the police could not have been acting in good faith reliance on the judge’s belief that such a conclusory allegation was sufficient, because the judge never given the opportunity to consider that allegation.

The affidavit in this case did not provide any facts supporting the claims that Mr. Roggenbuck was engaged in criminal activity, or provide anything more than conclusory allegations devoid of facts or information demonstrating the veracity of the statements. It was not sufficient to support a finding of probable cause and was so lacking in indicia of probable cause as to preclude objectively reasonable good faith reliance on the warrant. And even if the affidavit was sufficient to establish probable cause that some crime had been committed, it failed to make any connection between the alleged unspecified offenses and the search of the computer for child pornography requested in warrant

application. Thus, the trial court erred in not suppressing the evidence obtained as a result of the defective warrant.

## **II. The Entry of Five Separate Convictions Constituted a Violation of the Constitutional Protections against Double Jeopardy, Due Process and the Right to a Trial by Jury**

The trial court plainly erred in entering eight separate convictions, and eight consecutive sentences for possession of child pornography because the entry of multiple convictions pursuant to § 573.037 RSMo for possession of a series of images violated the prohibition against multiple punishments for a single offense under the double jeopardy clause of the Fifth Amendment of the United States Constitution and the due process and right to a jury trial provisions of the United States and Missouri Constitutions in that § 537.037 RSMo (2007 Supp.) does not provide for separate prosecutions of each individual image absent a showing that the defendant came into possession of each image on a separate date or from a separate source and that issue was not pled or submitted to the jury.

### ***Standard of Review and Preservation of the Issue***

Questions of law, including statutory interpretation and whether multiple convictions violate constitutional double jeopardy protections are reviewed *de novo*. *State v Cunningham*, 193 S.W.3d 774, 779 (Mo. App. S.D. 2006).

Because Appellant did not raise this issue below, however, review is limited to plain error review under Rule 30.20. Plain error review is appropriate where appellant's claim establishes grounds for believing a manifest injustice or miscarriage of justice has occurred. *Cunningham*, 193 S.W.3d at 783. The entry of multiple convictions in violation of constitutional double jeopardy protections constitutes a miscarriage of justice

warranting reversal under plain error review. *Id.* at 783; *State v. Polson*, 145 S.W.3d 881, 891 (Mo. App. W.D. 2004); *State v. Liberty*, SC 91821, slip op. at \*6 (Mo. banc, May 29, 2012).

In the Court of Appeals, the State argued that Mr. Roggenbuck waived this issue by failing to raise it below, citing *State v. Shinkle*, 340 S.W.3d 327, 334 (Mo. App. W.D. 2011). As *Shinkle* is not consistent with existing law and is based on erroneous reasoning, it should be overruled.

In *Shinkle*, the defendant was found guilty of two counts of receiving stolen property. *Id.* at 330. Because there was no allegation or proof that the defendant received each item at a separate time, the defendant on appeal alleged a double jeopardy violation, which had not been raised below. *Id.* at 332-333. The Western District believed that the failure to raise the issue below waived it, because the State had no statutory burden to prove that the two stolen items were received at different times. *Id.* at 333.

In reaching this conclusion, the court in *Shinkle* overruled *State v. Davidson*, 46 S.W.3d 68, 77 (Mo. App. W.D. 2001), which held that the State must affirmatively prove multiple violations of § 570.080 by adducing evidence that the stolen property was received on separate and unconnected occasions. 340 S.W.3d at 333, n. 5. According to the Western District panel in *Shinkle*, the decision in *Davidson* “was premised on the view that double jeopardy violations are jurisdictional,” and thus was no longer valid under *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. banc 2009). *Shinkle*, 340 S.W.3d at 333, n. 5.

However, neither *Davidson* nor the decisions relied on in that decision—*State v. Elliott*, 987 S.W.2d 418, 420–21 (Mo. App. W.D.1999), and *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992)—were based on the notion that double jeopardy violations are “jurisdictional.” Rather the line of decisions holding that such errors are not waived were premised on the notion that multiple convictions entered in violation of constitutional provisions constitute a manifest injustice and a miscarriage of justice warranting plain error review. See *State v. Polson*, 145 S.W.3d 881, 891, 896 (Mo. App. W.D. 2004); *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007); *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010); *State v. Liberty*, SC 91821, slip op. at \*6 (Mo. banc, May 29, 2012).

The reasoning undergirding *Shinkle* is also faulty. The opinion in *Shinkle* failed to distinguish between a claim alleging a double jeopardy violation arising from multiple or successive prosecutions from one involving multiple punishments. Thus, the court stated that “[b]ecause double jeopardy is an affirmative defense, it is the defendant’s burden to prove that double jeopardy applies.” *Shinkle*, at 334. The court then reasoned that because the defendant “did not plead or raise the affirmative defense of double jeopardy in the circuit court, she therefore ‘cannot fairly complain that the state should have offered more evidence against an affirmative defense [she] never raised.’” *Id.* at 334 (quoting *State v. Tipton*, 314 S.W.3d 378, 380 (Mo. App. 2010)).

The problem with this reasoning, however, is that a claim involving multiple punishments is fundamentally different from one alleging successive prosecutions. At issue in a case involving successive prosecutions is the ability of the State to proceed

with the action at all. Thus, the double jeopardy claim arises when the action is initiated, and proof of a successive prosecution double jeopardy violation requires proof of the previous action that is extrinsic to case at issue.

With respect to a claim involving multiple punishments, “[t]he protection against multiple punishments for the same offense does not . . . prohibit the state from prosecuting multiple offenses in a single prosecution.” *State v. Taylor*, 807 S.W.2d 672, 675 (Mo. App. E.D. 1991) (citing *Ohio v. Johnson*, 467 U.S. 493, 500 (1984)). The submission of multiple counts, even if arising out of a single offense, does not run afoul of double jeopardy clause. *Id.*; *State v. Bacon*, 841 S.W.2d 735, 741 (Mo. App. S.D. 1992). Thus, in contrast to a claim involving multiple prosecutions, “[t]he double jeopardy protection against multiple punishments does not arise until the time of sentencing.” *Taylor*, 807 S.W.2d at 675.

Because a double jeopardy claim for the imposition of multiple punishments does not arise until sentencing, the *Shinkle* court’s assertion that the claim is an affirmative defense that must be alleged and proved by the defendant prior to trial is incorrect. Because the claim does not arise until sentencing, the State would not have the opportunity to go back and submit additional evidence even if a defendant did raise it in a timely manner in the trial court.

For these reasons, the *Shinkle* decision should be explicitly overruled. Although the double jeopardy claim was not raised below at trial, the issue is one that can and should be examined under plain error review “because of the substantial rights involved.” *Taylor*, 807 S.W.2d at 675.

### *Discussion*

The double jeopardy clause of the Fifth Amendment to the United States Constitution states that no person “shall be subject for the same offense to be twice put in double jeopardy of life or limb.” U.S. Const., Amend. V. The double jeopardy clause has been made applicable to the states through incorporation into the due process clause of the Fourteenth Amendment. *Cunningham*, 193 S.W.3d at 780 (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969)). Included in the protections afforded by the double jeopardy clause is the protection against multiple punishments for the same offense. *State v. Good*, 851 S.W.2d 1, 3 (Mo. App. S.D. 1992); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Although there is no corresponding provision in the Missouri Constitution, the protection against multiple punishments is enforced through the common law. *Polson*, 145 S.W.3d at 892 n. 4 (citing *State v. McTush*, 827 S.W.2d 184, 188-189 (Mo. banc 1992)).

Protection from multiple punishments “is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature.” *State v. Dennis*, 153 S.W.3d 910, 918 (Mo.App. W.D. 2005) (quoting *McTush*, 827 S.W.2d at 186). “Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature.” *Id.*

With respect to multiple counts alleging multiple violations of the same criminal offense arising out of a single incident, “the appropriate test is what, under the statute, the legislature intended to be the allowable unit of prosecution.” *Good*, 851 S.W.2d at 4 (citations omitted); *see also United States v. Chipps*, 410 F.3d 438, 447-448 (8<sup>th</sup> Cir.

2005). “The legislature may expressly declare the limits of a unit prosecution. . . . When it has not done so, the cases afford little guidance in determining the intent of the legislature.” *Id.*

When the legislature has not clearly defined the appropriate unit of prosecution, the rule lenity should resolve any doubt “against turning a single transaction into multiple offenses.” *Good*, 851 S.W.2d at 5 (quoting *Bell v. United States*, 349 U.S. 81, 84 (1955)); *see also Chipps*, 410 F.3d at 449 (applying the rule of lenity after concluding that Congress had not specified the unit of prosecution for simple assault with clarity).

In this case, the State charged Appellant with five counts of possession of child pornography for his possession of five allegedly pornographic images found on his computer. (L.F. 36-39). He was convicted of all five counts as a prior and persistent offender and sentenced to five consecutive seven-year terms of imprisonment. (L.F. 127).

The statute applicable at the time of the alleged offenses read:

1. A person commits the crime of possession of child pornography if, knowing of its content and character, such person possesses any obscene material that has a child as one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct.
2. Possession of child pornography is a class D felony unless the person has pleaded guilty to or has been found guilty of an offense under this section, in which case it is a class C felony.

Section 573.037 RSMo (2007 Supp.)

At issue here is whether the phrase “any obscene material” unambiguously expresses the intent of the legislature to permit the prosecution for each individual obscene item found in the possession of a defendant. This Court considered this issue in *State v. Liberty*, SC 91821, --- S.W.3d --- (Mo. banc, May 29, 2012) and held that § 573.037 was ambiguous as to the unit of prosecution, the ambiguity could not be resolved by the application of the rules of construction, and therefore the rule of lenity *must* be applied and the statute *must* be interpreted favorably for the defendant. *Id.*, slip op. at \*8-12.

This Court also stated, however, that each image could constitute a separate unit of prosecution if there was evidence that the defendant came into possession of each image on a different date or from a different source. *Id.* at \*9. And the Court remanded the case, rather than discharging the defendant, so that the State could submit evidence showing that the defendant came into possession of the images on different dates or from different source to support the convictions on multiple counts. *Id.* at 13-14.

In this case, and unlike in *Liberty*, there was evidence submitted from which a finder of fact might have concluded that Mr. Roggenbuck came into possession of some of the images on different dates. However, Mr. Roggenbuck was not actually charged with having obtained each item on a separate date. (L.F. 36-39). Nor was the jury asked to find that Mr. Roggenbuck came into possession of each image on a separate date. (L.F. 68-77). The instructions mirrored the charges and required the jury to convict on each charge if it found Mr. Roggenbuck possessed and had knowledge of the content of the image “between and including January 18, 2007 and February 13, 2008.” (L.F. 68-

77). And the jury was instructed on the issues of constructive and joint possession. (L.F. 78). Thus, the jury was not required to find that Mr. Roggenbuck was the person who first downloaded or obtained any of the images. (L.F. 48-57). Rather, the jury was instructed that Mr. Roggenbuck was in possession of the images if he had “the power and the intention at a given time to exercise dominion or control over the object either directly or through another person or persons.” (L.F. 78).

Consistent with the instructions, the State argued the theory of constructive possession to the jury, arguing that “just because someone downloaded it onto his computer that does not get him off the hook. If he knew it was there and he possessed it.” (Tr. 490-491). As argued by the State, even if there was a question whether Mr. Roggenbuck was the person who placed the images on the computer, he still would be guilty because had control over the computer and because he must have known that the images were on the computer given the relative ease in accessing the PowerPoint file where they were located. (Tr. 485, 490-491, 507).

Thus, even though the evidence adduced by the State might have been sufficient to sustain a separate conviction for each count, this factual issue was not submitted to the jury. To sustain the convictions for multiple counts in the absence of a factual finding that Mr. Roggenbuck came into possession of each image on a separate date or from a separate location would violate Mr. Roggenbuck’s constitutional rights to due process and to a trial by jury. *State v. Smith*, 353 S.W.3d 100, 109 (Mo. App. W.D. 2011); *State v. Herndon*, 224 S.W.3d 97, 100 (Mo. App. W.D. 2009); *Apprendi v. New Jersey*, 530 U.S. 466, 476-484 (2000); U.S. Const, Amends. VI and XIV; Mo. Const., Art. I, Secs.

10 and 22(a). As recently noted by Justice Scalia, “[t]he rule of *Apprendi*. . . , is clear: Any fact—other than that of a prior conviction—that increases the maximum punishment to which a defendant may be sentenced must be admitted by the defendant or proved beyond a reasonable doubt to a jury.” *Oregon v. Ice*, 555 U.S. 160, 173 (2009) (Scalia dissenting). In this case, as the factual question of whether Mr. Roggenbuck came into possession of each image on a separate date would substantially increase his potential sentence from seven to thirty-five years. Therefore, the question must be submitted to the jury. And even if one did not have the right to jury trial on this issue, the imposition of multiple punishments due to the establishment of a fact with no notice or factual finding by even a judge as to existence of that fact surely violates the most fundamental concepts of due process.

As stated by this Court in *Liberty*, the imposition of multiple punishments without evidence that the defendant came into possession of each separate image on a different date or from a different source constitutes a violation of a defendant’s constitutional protections against double jeopardy. *Liberty*, slip op. at \*6-\*12. Consistent with that decision and a defendant’s constitutional rights to due process and trial by jury, multiple convictions cannot be sustained unless the factual issue concerning the date and manner in which the defendant came into possession of the pornographic material is pled and submitted to the jury. Therefore, the present case must be remanded for new trial so that both parties can address this issue and it can be submitted to the jury.

### **III. The Court Erred in Admitting Hearsay Evidence from the Resumes**

The trial court erred in admitting into evidence documents and testimony about the content of documents purporting to be resumes of Mr. Roggenbuck, in violation of Mr. Roggenbuck's rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because the content of the documents was hearsay in that the documents were offered for the truth of the matter asserted; and because the documents were admitted without a proper foundation as statements of Mr. Roggenbuck, in that State failed to authenticate Mr. Roggenbuck as the author other than by what the documents purported to be and by virtue of the fact that they were found on a computer in an apartment he leased.

#### ***Standard of Review***

Trial courts have broad discretion in determining whether to admit or exclude evidence, and appellate courts review such matters for an abuse of discretion and will reverse only upon a showing of prejudicial error. *State v. Carruth*, 166 S.W.3d 589, 590 (Mo. App. W.D. 2005).

### *Discussion*

In this case, the State admitted into evidence information contained on documents purporting to be Mr. Roggenbuck's resumes. (Tr. 437-449; State's Exs. 38 and 39).<sup>13</sup> Mr. Roggenbuck objected to the admission of these documents or testimony about them on the basis that they constituted hearsay and had not been properly authenticated. (Tr. 438-441, 444-446). Mr. Roggenbuck also included this issue in his motion for a new trial. (L.F. 124, ¶ 30).

The State provided no response to Mr. Roggenbuck's hearsay objection. However, as used by the State, the resumes did constitute hearsay. Hearsay evidence is in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant. *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981). The documents here were admitted for the truth asserted. They were admitted for the purpose of showing that Mr. Roggenbuck:

- did in fact use the e-mail address of "rscott52rscott@aol.com" (Tr. 442, 447; State's Exs. 38, 39);

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<sup>13</sup>In addition to State's Exhibits 38 and 39, the State elicited testimony concerning State's Exhibits 40, 43 and 44 to the effect that these documents contain information similar to that in Exhibits 38 and 39, but did not offer Exhibits 40, 43 and 44 into evidence. (Tr. 448-449).

- was proficient with a number of different computer applications (Tr. 442; State's Ex. 38);
- was or had been a student at Business Computer Training Institute, in Advanced Integrated Computer Applications (Tr. 442; State's Ex. 38);
- graduated in the top ten percent on September 5, 2003 (Tr. 443; State's Ex. 38);
- received professional hands-on training in a simulated office environment creating, editing and proofreading correspondence using advanced applications (Tr. 442; State's Ex. 38);
- lived at 400 North Studio Drive, A-2, Platte City, Missouri, 64079 (Tr. 446; State's Ex. 39); and
- hoped to gain "an administrative position utilizing [his] customer service and computer skills" (Tr. 447; State's Ex. 39).

As the contents of the documents were admitted for the truth of the matter asserted, they constituted hearsay and were not admissible unless they qualified under an exception to the hearsay rule. Although the State never articulated a basis for admitting the exhibits, it appears that the State was treating the documents as admissions or statements made by Mr. Roggenbuck. However, before the documents may be admitted on this basis, the State must authenticate them as having been authored by the defendant.

"The authenticity of a document cannot be assumed, and what it purports to be must be established by proof." *State v. Cravens*, 132 S.W.3d 919, 930 (Mo.App. S.D., 2004) (quoting *Estate of West v. Moffatt*, 32 S.W.3d 648, 653 (Mo. App. W.D. 2000)). "Even if a document purports to have been written and signed by the person to whom it is

attributed, that fact, standing alone, is insufficient to establish its authenticity and genuineness.” *Cravens*, 132 S.W.3d at 930 (citing *State v. Davis*, 849 S.W.2d 34, 41 (Mo. App. W.D. 1993)). In short, documents are not self-authenticating. The fact that the documents had Mr. Roggenbuck’s name on them is not sufficient to establish that he was the author. Nor is the fact that the documents were found on a computer in Mr. Roggenbuck’s apartment sufficient to authenticate Mr. Roggenbuck as the author. *Cravens*, 132 S.W.3d at 930 (the fact that the written document was found in the victim’s trailer was not sufficient to establish that the victim was the author). In this case, there was nothing other than these two facts (Mr. Roggenbuck’s name on the documents and the presence of the documents on a computer in his apartment), and there was no foundation laid to establish that Mr. Roggenbuck was the author of those documents. Thus, there was not a sufficient foundation for the admission of the evidence.

The erroneous admission of the evidence concerning the resumes was prejudicial and requires reversal. Error in admitting improper evidence requires reversal when the evidence is outcome-determinative. *State v. Douglas*, 131 S.W.3d 818, 824 (Mo. App. W.D. 2004). As stated by the Missouri Supreme Court in *State v. Barriner*:

[W]hen the prejudice resulting from the improper admission of evidence is outcome-determinative, reversal is required. A finding of outcome-determinative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable

probability that the jury would have reached a different conclusion but for the erroneously admitted evidence.

34 S.W.2d 139, 150 (Mo banc 2000)(citing *State v. Roberts*, 948 S.W.2d 577 (Mo. banc 1997), *cert. denied*, 522 U.S. 1056 (1998)). “In other words, the mere fact that there is overwhelming evidence of guilt is not the test; the test is whether there is a reasonable probability the jury relied on the improperly admitted evidence in convicting the defendant and that it would have reached a different result but for its admission.” *Douglas*, 131 S.W.3d at 824.

In this case, the improperly admitted information from the unauthenticated documents was critical evidence to establish Mr. Roggenbuck’s guilt. The State argued that the resumes were proof that Mr. Roggenbuck owned and used the computer, because the Yahoo Messenger program used the same user name as the email account listed on the resumes (Tr. 491). The State also argued that because the icons for the resumes were located on the desktop around the PowerPoint file icon, he must have at-least known of the contents of PowerPoint file. (Tr. 491). And the State argued that based on the information contained in the resumes, Mr. Roggenbuck was a relatively sophisticated computer user and thus must have used the computer on a regular basis and known that these images were on his computer:

Did the Defendant know that these images were on his computer?

Well, first of all, think about his general computer sophistication.

His resume talks about his computer skills. He specifically lists PowerPoint as one of the applications that he knows how to use and he says

that he graduated in the top 10 percent of his class at the Business Computer Training Institute. He considers himself a sophisticated computer user, maybe not as sophisticated as some of the people on this jury but he knows his way around a computer and he certainly knows enough to double click on a PowerPoint presentation that resides on his desktop. . . .

(Tr. 493).

Think about what Ms. Hamley said the Defendant's education was in dealing with computers and what his skill was with computers. Mr. Seufert read about his computer training, where he went to the Business Computer Training Institute. That's the school. This course work was Advanced Integrated Computer Application. Advanced Integrated Computer Application, ladies and gentlemen, graduated in the top 10 percent of his class in 2003. That's some five years prior to when this charge happened, when this computer was found. Top 10 percent, five years previously, coursework, Advanced Integrated Computer Application.

(Tr. 503-504)

The PowerPoint was on the desktop from November 3rd of 2000 -- at least we know it was on the desktop from November 3rd, 2007, to the time the police executed the search warrant on February 13th of 2008. Two and a half months, ladies and gentlemen, for a man who is skilled in

computer training. It's there, these images that were in this PowerPoint or are in My Picture folders that contain his picture.

(Tr. 505).

Let's talk about possession. Possession can be sole or it can be joint. I believe that is Instruction . . . No. 11. Let's look at that. A person has actual possession if such person has the object on his or her person or within easy reach and convenient control. The man sits in front of his computer desk pretty much every day. . . .[A]nd since November 3<sup>rd</sup> of 2007 that icon was staring him in the face every day.

(Tr. 506).

In the absence of the unauthenticated hearsay, there was a reasonable probability that the jury would have concluded that someone else downloaded the images, and Mr. Roggenbuck was not aware of their presence. According to Detective Neland, there was more than one person living at the apartment. (Tr. 264). The computer examiner determined that there were numerous users of the computer, even though she was not looking for that. (Tr. 387, 432-433, 463). Although the PowerPoint file was on the desktop, there were approximately seventy-six other documents, files, or programs on the desktop. (State's Ex. 36). It would not be all that difficult to believe that Mr. Roggenbuck had no reason to open the PowerPoint file or was unaware of what was in it given the icon to the file was one of more than seventy icons on the desktop. (State's Ex. 36). It would not even be difficult to believe that Mr. Roggenbuck did not even routinely use the computer or all of the functions on the computer. Knowing that it faced this

problem, the State therefore elicited the incompetent evidence concerning the resumes to provide the prosecutor with a basis to argue, as he did, that Mr. Roggenbuck was sophisticated computer user and likely to have been a heavy user of the computer, who must have at least known that the images were on the computer. There is a reasonable probability that but for the admission of this evidence, the outcome of the trial would have been different.

## **CONCLUSION**

Based on the argument presented, Appellant respectfully asks this Court to reverse his convictions and to remand to the trial court for a new trial with instructions to enter an order suppressing evidence obtained as a result of the search and seizure of the apartment and computer.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Frederick J. Ernst, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 14,378 words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A copy of the foregoing and separate appendix in PDF format without hyperlinks was filed electronically with the court on August 13, 2012. The electronic files have been scanned for viruses using a Symantec Endpoint Protection program. According to that program, the electronic files are virus free.

Pursuant to the Missouri Supreme Court electronic filing system, an electronic copy was sent to James Farnsworth, jim.farnsworth@ago.mo.gov; Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, on August 13, 2012.

/s/ Frederick J. Ernst  
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